Filed 6/23/09 In re School District Construction Cases CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

IN RE SCHOOL DISTRICT CONSTRUCTION CASES	G040896 (Super. Ct. Nos. JCCP4517/PC033554) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Stephen J. Sundvold, Judge. Motion to dismiss appeal. Appeal dismissed.

Gladych & Associates, John A. Gladych, and Randall S. Guritzky for Defendant, Cross-complainant, and Appellant.

McInerney & Dillon, Robert L. Leslie, and Alexander Bannon for Plaintiff, Cross-defendant, and Respondent.

* * *

An appellate court reversed a judgment in favor of Franklin Reinforcing Steel Company, Inc. (Franklin), and against Thompson Pacific Construction, Inc. (Thompson), and remanded the matter to the trial court. Thompson made a motion in the lower court for restitution of money it had paid Franklin on the judgment. The trial court granted Thompson's motion twice — first, in the form of a court order, and second, almost four months later, in a document entitled a "judgment." It is this latter "judgment" from which Franklin purports to appeal. In its respondent's brief and in its motion to dismiss Franklin's appeal, Thompson argues the trial court's ruling is not appealable. As we shall discuss, the court's ruling, whether deemed a judgment or an order, is not appealable under Code of Civil Procedure section 904.1. Thus, we lack jurisdiction to consider Franklin's appeal and must dismiss it. (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126.)

FACTS

Thompson, a general contractor, sued its subcontractor, Franklin, for breach of contract and negligence relating to concrete reinforcing work on a high school located in the Los Angeles Unified School District (the district). A week after Thompson filed its complaint, Franklin sent the district (and Thompson) a public works stop notice, stating that Franklin had furnished labor and materials on the high school project and was currently owed $120,003.44, and that the district was required to withhold construction funds under Civil Code section 3186 (which requires a public entity in receipt of a stop notice to withhold payments from the original contractor). Franklin cross-complained against Thompson, the district and another defendant for breach of contract, enforcement of public works payment bond, and enforcement of public works stop notice. Prior to trial, the court dismissed Thompson's complaint with prejudice.

The case proceeded to trial on only the cross-complaint's first and second causes of action, not the third cause of action on the stop notice. (The court apparently bifurcated the trial, separating the first two causes of action from the third.) By special verdict, the jury found Franklin substantially performed its subcontract with Thompson, but did *not* "fulfill the conditions precedent to payment."[1] The jury further found Franklin was entitled to $116,758 under the subcontract, but that Thompson suffered damages of $39,470 for Franklin's delay in performing its project work. Accordingly, the court awarded Franklin $77,288 ($116,758 minus the offset of $39,470), as well as attorney fees of $85,000 and costs of $12,140.65. Thus, Franklin's total award was $174,428.65. The court ordered Thompson and Franklin, respectively, to file briefs on "the current status of the stop-notice claim" and "what going to trial on the stop-notice claim would accomplish."

Thompson paid Franklin $174,428.65. Franklin dismissed the cross-complaint's third cause of action on the stop notice with prejudice, resulting in a "final termination of litigation in the trial court." Both parties appealed to the Second District Court of Appeal, with Franklin challenging "the trial court's order awarding it attorney fees" and Thompson appealing the judgment against it and the court's dismissal of its complaint and imposition of sanctions against Thompson.

In October 2007, the Second District Court of Appeal reversed the judgment on Franklin's cross-complaint after finding the jury's special verdict was inconsistent. The appellate court also reversed the lower court's dismissal of

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[1] Thompson later acknowledged that Franklin subsequently "satisfied the contract's conditions precedent to final payment by providing the contractually required as-built drawings, certified payrolls and final releases."

Thompson's complaint and imposition of monetary sanctions against Thompson and its attorneys.[2]

Following the reversal of the judgment, Thompson's counsel sent Franklin's attorney a written request for Franklin to return "all monies" paid by Thompson. In a reply letter, Franklin's counsel stated the most Franklin could have been "arguably 'over-paid' [was] approximately $26,400" because Franklin accepted Thompson's payment "in exchange for the release of the stop notice and the dismissal of the stop notice enforcement cause of action."

In April 2008, Thompson moved the court for an order of restitution. Thompson asked the court to order "that [Franklin] return all or part of the $174,428.65 paid by [Thompson] to satisfy" the reversed judgment. Thompson asked the court, in the interest of justice, to impose "an equitable lien in favor of Franklin on sums held by the [district] which are due Thompson in the same amount and same scope and subject to the same claims and defenses, as to its prior stop notice."

Franklin opposed the motion, arguing that "because Thompson did receive full payment for Franklin's work from [the district] and did receive a release of Franklin's stop notice, Franklin [was] entitled to keep the payment made for its work to the extent of the released stop notice claim." Franklin claimed the parties' intent was to have the money "applied to the stop notice amount and all accrued interest thereon first, thereby requiring Franklin to release the stop notice and dismiss the stop notice enforcement cause of action."

In a minute order, the court granted Thompson's restitution motion and ordered Franklin to pay Thompson $174,428.65 with accrued interest. Inter alia, the court stated: "The *status quo ante* is that no judgment exists, no settlement exists and all

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[2] This case and other actions relating to Thompson and/or the district were subsequently coordinated in the Orange County Superior Court in the Judicial Council Coordinated Proceeding titled the "School District Construction Cases."

the Parties have all of the rights they had before the judgment was entered. That results in all of the funds being ordered returned to Thompson. If Franklin wishes to reinstate its cause of action on the stop notice, it can take the appropriate steps to do so. [¶] Franklin would have this Court allow Franklin to retain the funds because it has a claim on them. The only problem is that the claim is disputed and is the subject of these proceedings."[3] The court also denied Thompson's request for an equitable lien.

On May 7, 2008, Thompson served Franklin with notice of entry of the court's formal order (dated April 29, 2008) granting Thompson's restitution motion. Inter alia, the court's formal order stated Franklin was "required to make restitution to [Thompson] of $174,428.65 received by reason of satisfaction of the judgment" which had been reversed.

On August 20, 2008, a "Judgment for Return of Money Paid to Satisfy a Reversed Judgment" prepared by Franklin's counsel and signed by the court was filed with the court clerk. On August 21, 2008, Franklin's notice of entry of this restitution judgment was filed and served on Thompson and other parties. The restitution judgment contained language similar to the court's April 29, 2008 order granting Thompson's restitution motion.

The next day, August 22, 2008, Franklin filed a notice of appeal purporting to appeal from the restitution judgment. Thompson responded to Franklin's opening brief on the merits and separately moved to dismiss the appeal as taken from a nonappealable order.

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[3] On appeal Franklin contends it cannot reinstate its stop notice claim because the statutory time period for re-filing the stop notice "has long since passed."

DISCUSSION

"In general, the right to an appeal is entirely statutory; unless specified by statute no judgment or order is appealable." (*Garau v. Torrance Unified School Dist.* (2006) 137 Cal.App.4th 192, 198.) "[T]he right of appeal is entirely statutory and . . . there is no constitutional right of appeal." (*Leone v. Medical Board* (2000) 22 Cal.4th 660, 668.) The statutory rights of appeal are generally set forth in Code of Civil Procedure section 904.1. This appeal potentially invokes two of those rights. An appeal may be taken: (1) "From a judgment, except . . . an interlocutory judgment," with exceptions not here applicable (Code Civ. Proc., § 904.1, subd. (a)(1)); and (2) "From an order made after" an appealable final judgment (Code Civ. Proc., § 904.1, subd. (a)(2)). Stated somewhat more simply, among the statutory appeal rights under Code of Civil Procedure section 904.1 are the rights to appeal from a final judgment and from a postjudgment order.[4]

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[4] At oral argument on appeal, Franklin's counsel asserted for the first time that the restitution judgment/order is appealable as a collateral final judgment or order for the payment of money. "A recognized exception to the 'one final judgment' rule is that an interim order is appealable if: [¶] 1. The order is collateral to the subject matter of the litigation, [¶] 2. The order is final as to the collateral matter, and [¶] 3. The order directs the payment of money by the appellant or the performance of an act by or against appellant." (*Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal.App.4th 289, 297-298.) "A matter is collateral when it is 'distinct and severable from the general subject of the litigation.'" (*Steen v. Fremont Cemetery Corp.* (1992) 9 Cal.App.4th 1221, 1227.) "[T]he test is whether an order is 'important and essential to the correct determination of the main issue.'" (*Ibid.*) Here, the restitution judgment/order is *not* collateral to this litigation's subject matter, i.e. whether Thompson owes Franklin money, or vice versa, under the subcontract. The restitution judgment/order holds that Franklin is not entitled to keep any money paid to it by Thompson under the reversed judgment. That determination clearly comes within the general subject matter of this litigation and is essential to the correct determination of the main issue of how much money either party still owes the other under the subcontract.

Under California's "one final judgment" rule, there is ordinarily only one appealable judgment in any action. (*Rubin v. Western Mutual Ins. Co.* (1999) 71 Cal.App.4th 1539, 1546.) A "judgment is a final determination of the rights of the parties." (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 698.) "'As a general test, which must be adapted to the particular circumstances of the individual case, it may be said that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory.'" (*Ibid.*)

Here, the restitution "judgment" is at best an interlocutory judgment, and the original restitution order is at best an interlocutory ruling. Neither the order nor the "judgment" finally determine the parties' rights under Thompson's complaint or Franklin's cross-complaint. Interlocutory judgments are expressly made nonappealable by Code of Civil Procedure section 904.1, subdivision (a)(1).

Furthermore, the court's order granting Thompson's restitution motion is not appealable under Code of Civil Procedure section 904.1, subdivision (a)(2). The restitution order is not appealable as a postjudgment order, because the original judgment in this case was reversed by the Second District Court of Appeal. (*Barnes v. Litton Systems, Inc.* (1994) 28 Cal.App.4th 681, 684.) "'The effect of an unqualified reversal ("The judgment is reversed") is to *vacate* the judgment, and to leave the case "at large" for further proceedings as if it had never been tried, and as if no judgment had ever been rendered.'" (*Regents of University of California v. Public Employment Relations Bd.* (1990) 220 Cal.App.3d 346, 356-357.)[5] Thus, there was no extant appealable judgment

[5] The appeal from the restitution order was also untimely. The deadline for Franklin to file a notice of appeal was 60 days after May 7, 2008, i.e. July 6, 2008. (Cal. Rules of Court, rule 8.104(a) & (f).) Thus, Franklin's notice of appeal filed on August 22, 2008 was untimely.

at the time the restitution order was entered. Franklin's remedy, if any, was by petition for writ of mandate, a remedy it did not pursue.

DISPOSITION

Thompson's motion to dismiss Franklin's appeal is granted.[6]

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.

[6] We deny Thompson's motion for attorney fees. In view of the unusual procedural posture of this case, Franklin's appeal is not frivolous under the standards set forth in *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649-650. And, because no final judgment has been reached in this case, there is no prevailing party at this time on any contract claims brought on a contract containing an attorney fees clause.